BRIEF IN SUPPORT OF PETITION

I. IT IS IMPORTANT THAT THIS COURT DECIDE WHETHER A CITIZEN MAY BE DEPRIVED OF A PRIVILEGE PRESCRIBED IN A STATUTE, BY MERE INACTION OF AN ADMINISTRATIVE OFFICER, WHERE THE CITIZEN HAS COMPLIED WITH ALL PREREQUISITES TO ACTION BY SUCH ADMINISTRATIVE OFFICER.

§ 112(f) of the Revenue Acts of 1932, 1934 and 1936, provided that where property was involuntarily converted into money which was forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the establishment of a replacement fund, no gain or loss should be recognized. The Treasury Regulations provided that the taxpayer might obtain permission to establish a replacement fund in his accounts, and in such a case should make application to the Commissioner. The taxpayer complied with all the provisions of the Regulations which were to be complied with by it and filed two separate applications for the establishment of a replacement fund. The Commissioner acted upon neither application.

The basis of the decision of the Circuit Court of Appeals was that the taxpayer had set up a replacement fund in its accounts, but that because of the negligent inaction of the Commissioner, the taxpayer had not "established" a replacement fund and was deprived of the privileges which the statute prescribed. In other words, under that decision, the Congressional purpose in enacting a relief provision can be completely subverted by negligent inaction on the part of an administrative officer. A replacement fund can

never be established "forthwith" if the Commissioner negligently fails to act on applications for permission to establish such a fund.

In view of the increasing complexity of the Federal laws, and the increasing tendency of Congress to extend the rule-making power of Federal administrative officers, it is important that this Court should decide whether a citizen may be deprived of a right given by a statute simply because of the negligent inaction of a Federal administrative officer, where that citizen has complied with all prerequisites to action by such administrative officer.

II. UNDER THE RULE LAID DOWN BY THIS COURT IN THE *DOBSON* CASE, THE CIRCUIT COURT OF APPEALS IMPROPERLY REVERSED THE TAX COURT UPON A QUESTION OF TAX ACCOUNTING.

The net award received by the taxpayer in 1932 was $160,092.81, against which was applied its tax basis of $136,564.83, leaving a realized gain of $23,527.98. The Tax Court found that $45,713.94 of such net award received in 1932 was forthwith expended in the acquisition of property similar or related in service or use to the property condemned.

Of the net award of $125,735.57 received in 1935, the Tax Court found that no part had been invested in similar property. Of the net award of $101,116.25 received in 1936, the Tax Court found that $51,116.25 was invested in similar property.

The last sentence of §112(f), during the years here in question, read as follows:

> "If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

The Tax Court accordingly decided that since only $45,713.94 of the net award of $160,092.81 received in 1932 was expended in similar property, leaving an unexpended portion of $114,378.87, the entire realized gain of $23,527.98 must be recognized. Applying the same theory, the entire gain of $125,735.57 realized in 1935 must be recognized. However, of the $101,116.10 received in 1936, $51,116.25 was expended in similar property. Accordingly, the Tax Court held that the recognized gain could not exceed the unexpended portion, or $50,000. The Tax Court explains its computation in a separate memorandum (R. 47-51). Such a rule of computation had been approved by the Circuit Court of Appeals for the Second Circuit in *Wilmore Steamship Co., Inc.* v. *Commissioner*, 78 F. (2d) 667.

The Commissioner, however, challenged the Tax Court's computation for the year 1936. He took the position that all three years should be treated as a unit for the purpose of determining the unexpended portion of the awards and that therefore not only should the unexpended portion of the 1936 award, namely, $50,000, be used in determining the 1936 taxable gain, but also the unexpended portion of the 1932 award and the 1935 award.

The Circuit Court of Appeals reversed the Tax Court and adopted the Commissioner's position. It overruled the *Wilmore Steamship* case.

§ 112(f) was amended by the Revenue Act of 1942, 56 Stat. 798, (§ 115(e)) to adopt the Commissioner's theory. The last sentence of § 112(f) now reads:

> "If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years and regardless of whether or not the money which is not so expended constitutes gain)."

However, that amendment was applicable only to taxable years beginning after December 31, 1941. See § 101 of the Revenue Act of 1942. It is not applicable to the years here involved.

In *Dobson* v. *Commissioner,* 320 U. S. 489, this Court laid down the rule that a Circuit Court of Appeals has no power to reverse the Tax Court on questions of proper tax accounting. This Court said (pp. 506-7):

> "The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting."

In the *Dobson* case the question was also whether events in previous taxable years could affect the taxability of an amount received in a later taxable year. The taxpayer there had purchased certain stock in 1929 and sold it at a loss in 1930 and 1931. Later he learned that he had been induced to purchase the stock through fraudulent representations. In 1939 he recovered in a suit against the seller. The question was whether the losses in 1930 and 1931 could be considered in determining the taxable status of the recovery in 1939. The Tax Court held that they could. It is implicit in this Court's opinion that had the decision of the Tax Court been to the contrary, the Circuit Court of Appeals would not thereby have been given power to reverse it.

In the instant case, the Tax Court held that what was done with the awards received in 1932 and 1935 could not

affect the taxability of the award received in 1936. This is just as much a matter of proper tax accounting as was the issue involved in the *Dobson* case and the Circuit Court of Appeals should have no more power to reverse the Tax Court.

During the year here in question, namely, 1936, there was, to quote this Court's opinion in the *Dobson* case (320 U. S. 489, 506), "no statute or regulation having the force of one and no principle of law" compelling the Tax Court to hold that what was done with the awards received in 1932 and 1935 affected the taxability of the award received in 1936. When the statute was changed in 1942, the Senate Finance Committee cited the holding in the *Wilmore Steamship* case as the reason for the change in the rule made by the statute (Sen. Rep. No. 1631, 77th Cong., 2nd Sess. p. 121). Whereas the statute involved in the instant case provides that the gain should be recognized in an amount "not in excess of" the money which is not so expended, the Revenue Act of 1942 changed the rule so that the gain was recognized "to the extent of" the money which is not so expended, regardless of whether such money is received in one or more taxable years.

In the instant case, the Circuit Court of Appeals, contrary to the *Dobson* rule, reversed the Tax Court on a question of proper tax accounting, i.e., whether transactions in prior years should be considered in computing the taxable gain for 1936.

Conclusion

The writ should be allowed (1) because the case presents an important question of Federal administrative

law, and (2) because the decision below is in direct conflict with the decision of this Court in the *Dobson* case.

Respectfully submitted,

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